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Supreme Court of the United States

October Term, 1955

No. 442

KENDRICK M. COLE,

Petitioner,

v

PHILIP YOUNG, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Introductory Statement

Respondents' Brief proceeds in large measure on an avoidance of the vital issue before this Court. That issue is whether a concededly loyal employee, holding a non-sensitive, non-policy-making position in the Department of Health, Education and Welfare, can be summarily suspended and dismissed from federal employment pursuant to a statute which authorizes summary suspension and dismissal of federal employees "when necessary or advisable in the interests of the national security."

Whether the President had the power to extend Public Law 733 to the Department of Health, Education and Welfare (Res. Br. 20-42) and whether Congress ratified the extension (Res. Br. 57-65) are not issues which are involved

in this case. The first and basic question before this Court, assuming the power of the President to extend Public Law 733 to the Department of Health, Education and Welfare, is whether the Secretary of that Department could dismiss petitioner under the terms of the statute, in view of the conceded facts.

Secondly, this Court is asked to determine whether Executive Order 10450, as applied to petitioner, invalidly cut off his rights under Section 14 of the Veterans' Preference Act because in conflict with the base statute—Public Law 733. But that is a separate question which we do not reach unless the Secretary's action was otherwise valid under the statute.

The third question is whether petitioner's notice of termination was a "written statement of the decision of the agency head" as required by Public Law 733. These are the basic issues of this case and the ones to which this Reply Brief is directed.[1]

I

The decision to discharge petitioner pursuant to the Act of August 26, 1950, could not be justified in the interest of national security as required by that Act and was therefore invalid.

In his prior brief, petitioner contended that on the conceded facts the Secretary of Health, Education and Welfare did not validly dismiss him "in the interests of national security," *i.e.*, pursuant to the Act of August 26,

[1] The question, raised on February 9, 1956, for the first time in this litigation, that petitioner's appeal to the Civil Service Commission was not timely (Res. Supp. Mem.) has been withdrawn, and will not be considered in this reply brief.

1950.[2] That is the initial question for decision by this Court, and, while respondents do not include it in their counter statement of "Questions Presented,"[3] they devote a major portion of their brief to answering it.[4] Nonetheless, they fail to meet the elemental proposition that action allegedly taken in the interest of national security must find some rational justification in that interest, and since in petitioner's case there was none, the Secretary's action in dismissing him under the 1950 Act was invalid.

We emphasize at the outset that it was the Secretary's action, for respondents irrelevantly answer that the courts cannot review her decision without encroaching on the President's constitutional discretion in political and foreign affairs (Res. Br. 22-23). Of course, that is not the case, for petitioner was an "inferior officer" within the meaning of Article 2, Section 2, Clause 2 of the Constitution, and just as Congress could vest his appointment in the Secretary of Health, Education and Welfare, it could, as it did in P. L. 733, limit the conditions of his removal

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[2] Referred to as "P. L. 733" by respondents and similarly in this reply brief.

[3] Res. Br. 2-3. Elsewhere they say that the ultimate question is whether P. L. 733 and Executive Order 10450 take away the right of appeal to the Civil Service Commission granted by Section 14 of the Veterans' Preference Act, 58 Stat. 387, as amended, 5 U. S. C. 863 (Res. Br. 15). Of course, they do take away that right, as the quickest reading of P. L. 733 makes clear. The true question, however, is the applicability of that statute to petitioner. The administrative appeal, as petitioner pointed out before (Pet. Br. 13-14), is only one of the vital procedural rights cut off by that Act if it applied to him.

[4] In widely separated portions of their brief they discuss this question in two phases: the scope of the authority vested in the Executive by the 1950 Act (Res. Br. 20-42), and whether the Secretary validly dismissed petitioner pursuant to that authority (*id.*, 62-65). But we think the question is put in clearer focus if these two phases of it are discussed together.

by her, without regard to the President. *United States* v. *Perkins*, 116 U. S. 483; *Eberlein* v. *United States*, 257 U. S. 82. But that question really is not involved here, for it is the Secretary in whom Congress vested the authority; it is she who dismissed petitioner, and it is her decision to do so, and the subsequent refusal of jurisdiction by the Civil Service Commission to hear his appeal, which petitioner complains of here.[5]

Respondents concede (Res. Br. 63) that "arbitrary or capricious action" by the Secretary "plainly unconnected with the good or efficiency of the federal service" under the Lloyd-LaFollette and Veterans' Preference Acts is subject to judicial redress. Therefore, we do not understand them seriously to suggest that her actions under the instant statute are any less subject to review where they are plainly unconnected with national security.[6] Such a result would discriminate reasonlessly against the public servant fired for one reason instead of the other. Moreover, it would open the door to wholesale evasion of the Lloyd-LaFollette and Veterans' Preference Acts themselves, for any arbitrary decision taken "notwithstanding" those statutes (see P. L. 733, Section 1) would stand beyond correction if only the word "security" were used. Petitioner contends his was such a case. But this Court

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[5] Petitioner also contends, of course, that Executive Order 10450 was invalid because of its substitution of a different and more onerous rule of employee termination than the Congressional one. The result was to subject petitioner and all other federal employees to a rigid new standard. But the effect of the Order is a separate question. *Initially*, the Order may be viewed as no more than a valid exercise of the President's power under Section 3 of the Act, a vehicle for extending the statute's substantive provisions to the Department of Health, Education and Welfare in addition to the other departments and agencies originally named in Section 1.

[6] Respondents make the point in passing (Res. Br. 21-22), but in view of their later concession, it seems purely a formal one.

turned its back on that alternative in *Wieman v. Updegraff*, 344 U. S. 183.[7]

However, the very idea of judicial review in such cases is one which makes no distinction as to the alleged cause for dismissal where arbitrariness is shown. Limited as such review is, it presupposes that Congress, in legislating for the civil service, did not do a vain thing, and that its enactments cannot be disregarded at the whim of the Executive. We have stated that the area of executive judgment under the Act of August 26, 1950, is large; yet it is not absolute, any more than in prior enactments. The limitation that such judgment cannot be arbitrary or capricious implies some objective standard to guide it, if only in the minimal sense of setting outer limits for its exercise. We contend that this was a case beyond those limits.

One aid to determining this standard is the specific problem which Congress sought to deal with in the 1950 Act. Therefore, petitioner referred to the history of the statute. Another aid is the common, contemporaneous understanding of the words used by Congress. See Holmes, *"Collected Legal Papers"* (1920), pp. 203-209. Therefore, petitioner adverted to prior judicial constructions of similar language and to executive interpretations of the statute itself. He did not claim talismanic potence for any of these authorities; however, to reject them all and suggest no alternative standard, as respondents do, is to propose anarchy without limits and, as we suggested (Pet. Br. 30-33), to invite grave constitutional difficulties. The statutory authority is not as "big as all outdoors"—it arises from a specific interest, "national security"—and it is no

[7] Respondents notwithstanding (Res. Br. 65), an employee removed from federal service as a "security risk" does wear the "badge of infamy." Insofar as the public is concerned, the term "security risk" is synonymous with "traitor." See, *e.g., Hearings, Senate Subcommittee, Committee on Post Office and Civil Service, pursuant to S. Res. 70*, 84th Cong., 1st Sess., June 2, 9, 23, August 30, 31, 1955, at pp. 67, 121-122, 130, 271, 550, 573, 599, 627.

answer, therefore, to reject every attempt to give it reasonable definition.

It would not advance matters, either, to bicker endlessly over the legislative history. Briefly, then, we repeat that

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[8] Nevertheless, respondents' assertion (Res. Br. 24-26) that a restrictive view of the bill was not shared by all members of Congress, or that some members of the Senate Armed Services Committee thought the bill applicable to all Government employment, is irrelevant. Cf. *Wright* v. *Vinton Branch Bank*, 300 U. S. 440, 463, ftn. 8; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110. The Senate and House Committee Reports, the Senate and House Committee Hearings, and the House Debates, when read in context, are cogent proof that P. L. 733 was never intended to cover petitioner. See: *S. Rep. No. 2158*, 81st Cong., 2nd Sess. (1950); *H. Rep. No. 2330*, 81st Cong., 2nd Sess. (1950); *Hearings, House Committee on Post Office and Civil Service on H. R. 7439*, March 7, 23, 30, 1950, *throughout*; *Hearings, Senate Committee on Armed Services on H. R. 7439*, July 20, 21, 1950, *throughout*; Statement of Congressman Murray, Chairman of the House Committee on Post Office and Civil Service, introducing and explaining H. R. 7439, *96 Cong. Rec.*, 10016-10017. After Congressman Holifield (who, together with Congressman Miller, offered amendments) predicted what would happen if an independent agency review proposal was defeated (Res. Br. 29-30), Congressman Kilday, in opposition to the Holifield and Miller amendments, stated: "* * * what I am trying to make clear is that when you relieve a man on the ground that he is a poor security risk if involves only the very critical functions of government, the very delicate things involved in our Government * * *" *96 Cong. Rec.* 10026. Subsequently, Congressman Murray explained his opposition to the Miller and Holifield amendments as follows: "This is not an employee bill. This is a bill in the interest of national security and the preservation of our defense. * * * The ultimate responsibility for defense agencies and their decision with reference to a bad security risk should not be subject to the review by a non-sensitive board like the Civil Service Commission." *96 Cong. Rec.* 10029. Thereupon, the amendments providing for independent agency review were defeated: *96 Cong. Rec.* 10029. It is the testimony of the legal draftsman, the testimony of the legislative proponents, and the views of Congressman Murray, who introduced and explained the measure in Congress, *96 Cong. Rec.* 10016-10017, 10029, not the expressions of those whose views were rejected, that is controlling as to legislative intent. *Schwegeman Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394-395.

Congress' concern was with security, that it sensibly realized that, in every case, security is necessarily related to the specific nature of the job held by the employee as well as to his personal conduct and character. Since the specific job was an indispensable element of the equation, the Act did not deal with disloyalty as such. "Disloyal persons in sensitive jobs were security risks as well, but "[d]isloyal persons should not be permitted to be employed in the Federal service under any circumstances." *S. Rep. No. 2158*, 81st Cong., 2nd Sess., p. 2 (1950).[9] Congress did not attempt to define forever the agencies or jobs coming under the Act; manifestly, it could not do so and, pragmatically, neither could the President. But its failure to make such a catalogue is not persuasive in the face of its manifest recognition to the contrary—that every job was not security-involved. Thus, it provided for reemployment of persons fired in other agencies; it even provided for restoration to the former job if the agency head so decided, *i.e.*, if on reevaluation he considered the job not truly sensitive. Elsewhere, it indicated not only the type of conduct which should be grounds for dismissal, but the kind of work which Congress was concerned with—work involving classified data, the formulation of policy or a particular leverage to do harm to the nation. It would serve no purpose to list all the examples given by members of Congress during the hearings on P. L. 733; it is sufficient to say that none of them remotely resembled the routine job of inspecting

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[9] In other words, such persons, regardless of their positions, may be dismissed for the efficiency of the service. Although that question is not in this case, since petitioner is not accused of disloyalty, we note that formerly loyalty suspects were processed under Executive Order 9835 (12 F. R. 1935), as amended (Executive Order 10241, 16 F. R. 3690), which was issued pursuant to the Lloyd-LaFollette and Veterans' Preference Acts. Even with the revocation of Executive Order 9835, such cases could still be processed under those statutes and the regulations issued for their effectuation. 5 *CFR* §§ 2.104(a)(7), 5.4.

sample lots of foods and drugs for purity and conformity to represented standards. Beyond such common knowledge of the kind of work that petitioner did, we have respondents' admissions that he was not a policy-maker nor one who had access to classified data or government secrets.

Similarly, we do not see how it aids resolution of the question here to show that consonant lay and executive interpretations of the Act were ignored by the President in issuing Executive Order 10450. Of course, they were; and no one would deny that the Order evidences one view of P. L. 733. But the Order itself is attacked here for the very reason that it rejects all limitations. To say that it is the final arbiter of what Congress meant is an act of self-levitation. Moreover, it suffers from the same weakness as respondents' brief: while on the one hand it implicitly accepts the abstract idea of limits to the statutory power, it effectively does away with them in practice. The views cited by petitioner were those of thoughtful and informed persons; they recognized, as the statute reveals on its face, that Congress did not intend to rework the whole civil service system in the name of "security" and they therefore understood it as having imparted authority only within rational limits. Since respondents do not deal with the judicial authorities cited by petitioner, we merely repeat that they too represent considered and intelligent views on similar standards used elsewhere.

Finally, then, respondents' dilemma is squarely posed on pages 62 and 63 of their brief. While protesting that the Secretary's authority under the Act was unlimited in the sense of not being subject to judicial review, they nonetheless concede that if her exercise of that authority was arbitrary or capricious in any particular case, it could be nullified by the courts. But, they say, this is not such a case and, thus, the question is finally and squarely posed.

Respondents suggest hypothetically how, though loyal and not in a policy-making or otherwise sensitive posi-

tion, petitioner, a Food and Drug Inspector, might have been a security risk because of close association with reported Communists: he might have transmitted information which should not be known by Communists "even though unclassified"; he might unwittingly have become "a dupe or a pawn" of subversives; the "seeds of disloyalty" might have been sown in him (Res. Br. 64-65). By the same token, F. B. I. Operative Herbert Philbrick, who has worked "under-cover" in the Communist Party, could not be employed as a washroom attendant in a Branch Post Office. And Charles Bohlen, our Ambassador to Russia, could not be retained as a Claims Examiner in the Veterans Administration. While it might be an error of misplaced concreteness to suggest more fully the fallacy of respondents' examples, we believe that they should be met, not only in petitioner's interest, but also in the interests of democratic government.

The problem of security is real, and we do not minimize the Government's difficulty in handling it. But the problem of balancing the demands of "security" and the rights of the "individual citizen" has always plagued all branches of Government. Cf. *Duncan* v. *Kahanamoku*, 327 U. S. 304. Respondents' hypotheticals enunciate the concept of "total security," and thus reject the very essence of "the national security of the *United States*," embracing instead the "security" concept of some totalitarian nation. Cf. Laswell, "*National Security and Individual Freedom*" (1950), pp. 23-75. Former Senator Cain put it in these words: "We must * * * tailor security to the job. An individual may be unsuited for the strictness of security demanded by a particularly sensitive assignment. This does not necessarily imply that the individual couldn't fill many other important assignments with credit to himself and the Government. * * * If this were Russia, we wouldn't bother much. * * * Because we live in America, we must be bothered constantly." *Washington Post*, January 16, 1955, p. 7. Thus, the revelation of unclassified

or non-secret information is a simple breach of confidence—not an act detrimental to national security. Cf. *Heine* v. *United States* (2 Cir.), 151 F. 2d 813, cert. den., 328 U. S. 833. Unlike Petrov in the "Australian episode," petitioner had nothing pertaining to security to reveal. If the "seeds of disloyalty" were planted in him, it is remotely conceivable that he might contaminate food he was required to inspect in time of national emergency.[9a] But so could any one of hundreds of thousands of workers employed in industrial plants processing food for national consumption. Cf. *Parker* v. *Lester* (9 Cir.), 227 F. 2d 708, 721. It is because "the national security of the *United States*" weighs "individual rights" in relation to "national safety" that the Interdepartmental Committee on Internal Security said: "Any act, or failure to act, which would have the effect of weakening or compromising [the ability of the country to protect and defend itself against hostile or destructive action, overt or covert, including enemy military action, relates to 'national security' as used in Public Law 733]. * * * On the other hand, acts or failures to act which would have no direct bearing on the ability of the country to protect or defend itself against hostile or destructive action cannot be said to endanger the national security. This is true even though such act, or failure to act, may be a breach of confidence or trust; may cause embarrassment to a department or agency of the Government, or to a Government official or officials, or to private citizens; may cause financial loss to the Government or unjust enrichment of a person or persons; or may endanger a non-security program of the Government. Thus, many departments and agencies are responsible for functions which, while they are intimately connected with the welfare and happiness of the people of this country, are not directly related to the national security as that term is used in

[9a] We repeat, however, that petitioner's disloyalty, putative or actual, is not even suggested. *Pet. Br.* 5.

connection with an employee security program." *Pet. Br.*, Appendix "B", p. 64.

The vice of respondents' hypotheticals characterizes much of their brief: while conceding that "the national security" is an objective standard within limits, they nonetheless argue that it has no limits whatsoever. The courts cannot abdicate their function in construing P. L. 733 merely because the word "security" is asserted in answer to the issues raised by petitioner. The issue is not new—for they are faced with the same problem whenever the Government asserts its evidentiary privilege against the disclosure of military and security secrets. In *United States* v. *Reynolds*, 345 U. S. 1, the late Chief Justice made it clear that the courts must be satisfied from all the evidence that the evidentiary privilege is *validly claimed*. Chief Justice Vinson stated:

> "Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control of the evidence in a case cannot be abdicated to the caprice of executive officers" (*id.*, at pp. 9-10).

With appropriate word changes, we believe these sentences controlling on the issue in question.

We need not consider whether respondents' hypotheticals (Res. Br. 64-65) would have supported termination under the Lloyd-La Follette and Veterans' Preference Acts, for the simple reason that the Secretary did not even propose to act in accordance with those statutes. Had she done so, petitioner would not have been suspended; he would have been entitled to a fuller statement of the charges, given to him prior to suspension, and he would have been entitled to appeal to the Civil Service Commission to show why he should not be dismissed. Indeed, since this should have been, *if at all*, a dismissal for the "efficiency of the service" and not in the interests of national security, he should have been accorded those rights, and because he was denied them, his discharge was invalid.

II

Executive Order 10450 deprived the agency head of her statutory discretion and subjected petitioner to a more onerous standard than provided by P. L. 733, thereby invalidating his discharge.

As we have contended, the agency head acted beyond her statutory authority and, therefore, invalidly terminated petitioner's employment, pursuant to P. L. 733. Nevertheless, it is true that certain provisions of Executive Order 10450 virtually required her to do so, and in these respects the Order conflicts with the statute.

While the President's Order extended the statute to all other departments and agencies, which we assume, *arguendo,* he was empowered to do, it had an additional, twofold effect which went beyond his statutory authority: specifically, it required the department and agency heads to apply certain absolute security criteria to every employee; and it substituted a different and more onerous general standard for retention of all employees than that contained in the statute. These two aspects of the Order may be treated as one, inasmuch as they are integrally related, together drastically limiting, if not preempting, the statutory discretion of the various department and agency heads, including the Secretary of the Department of Health, Education and Welfare, as the instant case shows.

Chief Judge Edgerton noted in his dissent below that Congress intended even the President's power to extend the Act's provisions to new agencies to be exercised selectively, "from time to time," when specific agencies became involved in security work. (226 F. 2d 337, 341-342). "There is * * * not the slightest reason to suppose that Congress intended to authorize the blanketing of all agencies." (*id.*,

226 F. 2d., at p. 342). Such a construction, he pointed out, would lead to an absurd result, for it would render meaningless the statutory provision that employees considered security risks in sensitive work may be reemployed in nonsensitive agencies. (*Ibid.*)[10] Judge Edgerton's reasoning is compelling. When it is turned upon the President's directive which applied the Act not only to every department and agency, but to every one of over two million federal jobs, ranging from arboretum grounds keeper to intelligence agent, it becomes unanswerable.

A. Executive Order 10450 Deprived the Agency Head of Her Statutory Discretion.

If Executive Order 10450 was merely an exercise of the President's power to guide his subordinates in the construction and administration of P. L. 733 (Res. Br. 48-56),

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[10] This was also the view of former Solicitor General Perlman:

"The conclusion that it was impossible to treat disloyal persons and security risks in the same manner was based mainly on the ground that disloyal persons should not be employed anywhere in the Federal service; but that persons found to be security risks, where matters of a confidential or sensitive nature are handled, might be qualified and suitable for employment in a nonsensitive agency.

"It may seem to be curious that final determinations in cases of subversion and disloyalty involved procedures for notice, hearing, and successive appeals, although employees charged with being security risks—and not with disloyalty—might be removed from sensitive agencies without notice and without pay, pending final action.

"On reflection, the reasons seem obvious. As already stated, it was provided in the act of Congress that any official or employee deemed unsuitable as a security risk in sensitive agencies, which were comparatively few in number would, if qualified for employment elsewhere in Government, be eligible for such employment." *Hearings, Senate Sub-Committee, Committee on Post Office and Civil Service, pursuant to S. Res. 20*, 84th Cong., 1st Sess., June 9, 1955, pp. 111-112.

petitioner could not complain. But that is demonstrably not the case; for the instant situation amply illustrates how the Presidential Order deprived the agency head of the very discretion she was required by P. L. 733 to exercise. Because petitioner, a Food and Drug Inspector and a concededly loyal citizen, constituted no threat whatever to the national security, his dismissal was arbitrary by the test of the statute. Yet it was contemplated, and indeed demanded, by the Executive Order. Petitioner was required to show, without relation to the nature of his work, that his retention was "clearly consistent" with the President's version of "national security," in order to avoid the consequences of a discharge. This "security," as the President's Order stated, required that all employees meet minimum, mutually consistent (*i.e.* inflexible) standards of reliability, trustworthiness, and good conduct and character. To give content to these standards, the President listed certain factors relating to "suitability,"[11] which were to be considered in relation to the sensitivity of the employee's work; but the remaining factors, relating to political conduct, *i.e.*, "subversion,"[12] were required to be considered in every case, for where they occurred they were derogatory in the absolute sense, regardless of the nature of the information (*e.g.*, whether concerning acts of treason or friendship with one of Justice Holmes' "puny anonymities") and regardless of the employment in question (*e.g.*, whether F. B. I. Agent or zoo attendant). Among these "subversive" factors were "* * * sympathetic association * * * with any person who advocated the use of force or violence to overthrow the Government of the United

[11] *Executive Order 10450*, Section 8(a)(1).

[12] *Executive Order 10450*, Sections 8(a)(2) to (7).

States by unconstitutional means," [13] and "affiliation or sympathetic association with any organization listed by the Attorney General." [14]. The charges against petitioner came within these provisions (R. 16-18, 21). In evaluating these charges, the Secretary had no leeway for judgment, for she could not discount them in relation to the job petitioner held.

We think it clear that a concededly loyal employee who associates with Communists; an alcoholic; or a person addicted to narcotics, may present a risk to the national security interest where his position gives him access to classified or secret information, or the opportunity to influence policy. But if the loyal employee occupies a non-sensitive, non-policy-making position in an agency not primarily concerned with national defense or related matters, he is no more a "risk" if he associates with Communists than he is if he uses narcotics. The Executive Order provides that drug addicts and alcoholics holding non-sensitive jobs are not "security risks" [*Executive Order 10450*, Section 8(a)(1)], as distinguished from individuals who associate with Communists (although com-

[13] *Executive Order 10450*, Section 8(a)(3).

[14] Executive Order 10450, Section 8(a)(5). Section III(3) of Executive Order 9835, 12 F. R. 1935 (May 27, 1947) originally authorized the Attorney General to designate organizations of six types in connection with the loyalty program set up by that Order. Although this program was replaced by the more general security program in Executive Order 10450, Section 12 of the latter continued the Attorney General's power to list organizations of these six types and Section 8(a)(5) of Executive Order 10450 describes these organizations in the same terms as Executive Order 9835 previously had. On May 27, 1948 (13 F. R. 6135, 6138), the Attorney General designated Nature Friends of America as "Communist," claiming that this was its 'dominant characteristic' (13 F. R. 6137). However, the organization never had a hearing on the fairness of this designation in the five and one half years between that date and petitioner's termination. See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. Moreover, whether or not this was its 'dominant characteristic', petitioner claimed that his connection with the organization was casual, innocent and intermittent (R. 27, 29-31).

pletely loyal themselves). *Executive Order 10450*, Sections 8(a)(2) to (7).[15]

B. Executive Order 10450 Placed a "More Onerous Burden" on Petitioner Than P. L. 733.

(1) Respondents' assertion (Res. Br. 43-44) that petitioner was not terminated under the provisions of Executive Order 10450, Section 7, is erroneous. Once an employee is suspended, the Executive Order requires the agency head to determine whether retention, as an affirmative matter, is "clearly consistent with the interests of the national security," even where the employee fails to avail him-

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[15] The apparent confusion is caused by the use of the criteria relating to "subversion" as a yardstick for determining "loyalty." While it was generally conceded in Congress that "disloyal" employees in non-sensitive jobs were security risks, it was only in connection with sensitive employment that Congress contemplated the removal of a concededly loyal employee as "security risk" on the ground that his personnel file included derogatory information with reference to "subversion." *Pet. Br.* 17-29. On the facts of petitioner's case, the vice of Executive Order 10450 is that it establishes by indefinably broad and absolute criteria a new kind of "risk"—the "non-disloyal subversive." In fact, Executive Order 10450 purported to adopt the criteria of Executive Order 9835 with respect to loyalty. Compare *Executive Order 9835*, Part V, Sections 2(a) to (f), with *Executive Order 10450*, Sections 8(a)(2) to (7). When these criteria were applied to petitioner's non-sensitive job and were found to require his termination, he was discharged, not because he was a "security risk," but because he was this new type of "loyalty risk." But respondents concede that petitioner is loyal! In considering this aspect of the Executive Order, it is important to reiterate that, while P. L. 733 is concerned with security, its legal effect is almost exclusively procedural. For reasons of national security, it permits the summary suspension and unappealable discharge of employees without the normal protections given an employee suspended or removed for "the efficiency of the service" under the Veterans' Preference Act. Thus, the grounds for removal—"efficiency of the service" or "national security"—made a vital difference in the procedures by which petitioner's removal was accomplished. *Cf. Flanagan v. Young* (C. A. D. C.), No. 12288 — F. 2d —, December 22, 1955.

self of a "hearing." If reinstatement is not "clearly consistent," only then is the employee discharged. Bureau of National Affairs, "*Government Security and Loyalty*," pp. 11:32, 11:34, 11:39, 11:43, 11:57. Security Regulations, *Department of Health, Education and Welfare*, Section 5(f)(3), *id.*, at p. 15:565. Indeed, petitioner's "termination notice" shows that he was terminated because the Secretary found that his "continued employment [was] not clearly consistent with the interests of national security" (R. 21). Therefore, Sections 2, 7 and 8(a)(2) to (7) of Executive Order 10450, and not Section 6, are the provisions under which petitioner was discharged, and the provisions of the Executive Order upon which this issue turns.

(2) Respondents notwithstanding (Res. Br. 44), the only place Section 6 of Executive Order 10450 has relevancy is in connection with petitioner's suspension, as distinguished from his termination.[16] Bureau of National Affairs, "*Government Security and Loyalty*," pp. 11:20-21; Justice Department, "*Sample Security Regulations*", Section 5(a). *Id.*, at pp. 15:103-104. The provisions of Section 6 of the Executive Order are adopted in the Security Regulations of the Department of Health, Education and Welfare, Sections 5(a) and (b), which relate to "summary suspension". *Id.*, at p. 15:564. Section 5(c) of the Health, Education and Welfare Regulations, which permits a weighing of the charges in relation to the "sensitivity" of the employment, is applicable only to suspensions under Section 5(b). *Id.*, at p. 15:564. Such was not the case when the agency head made her required

[16] The action of the agency had challenged as invalid in the instant case is petitioner's termination on or about January 15, 1954 (R. 10-11, 12, 21), not his suspension on November 13, 1953. (R. 15).

determination under Sections 2 and 7 of the Order to reinstate or terminate petitioner, for termination could have been accomplished by the agency head only *subsequent* to her finding that petitioner's retention was not "clearly consistent with the interests of the national security." Cf. *S. Rep. No. 2158*, 81st Cong., 2d Sess., p. 3 (1950). Sections 2 and 7 of the Order, as reflected in Section 5(f) of the Security Regulations of the Department of Health, Education and Welfare, precluded the Secretary from considering the non-sensitivity of petitioner's employment when she made her determination to discharge him (R. 21). In making her required determination under Sections 2 and 7 of the Order [Department of Health, Education and Welfare, *Security Regulations*, Section 5(f)] the Secretary would have been permitted to weigh the charges relative to the non-sensitivity of petitioner's job only where the derogatory information related to "suitability" on non-political grounds, as distinguished from "suitability" on political grounds, *i.e.*, "subversion." Compare *Executive Order 10450*, Section 8(a)(1), with *Executive Order 10450*, Sections 8(a)(2) to (7). This fact is clearly set forth in Section 2 of the Health, Education and Welfare regulations, which, after setting forth the "clearly consistent" standard, provides:

> "It shall be the policy of this Department that action on cases involving personnel holding non-sensitive positions in which the relationship of the Government employment to the national security is remote shall normally be taken under routine personnel procedures if no part of the derogatory information relates to *subversion*." ("*Government Security and Loyalty*," *id.*, at p. 15:561. Emphasis supplied.)

The "necessary or advisable" standard of P. L. 733, as reflected in Section 6 of the Executive Order, is applicable solely to cases of summary suspension, since the "clearly consistent" standard of Executive Order 10450, Sections 2 and 7, relates to employee *retention* and or *termination*

as distinguished from such *suspension*. Furthermore, wherever the Executive Order uses the statutory standard, as it does in Section 6, the agency head is permitted to weigh the charges relative to the sensitivity of the employment. "*Government Loyalty and Security*," *id.*, at pp. 15:104, 15:564. But wherever the Executive Order uses the "clearly consistent" standard established by Sections 2, 8(a) and 7 of the Executive Order, the agency head is precluded from making this evaluation, except in cases solely concerned with employee "suitability" under Section 8(a)(1). Therefore, the only occasions upon which the Secretary may consider the sensitivity of the employee's position under the Executive Order is when the charges relate strictly to "suitability" on non-political grounds [*Executive Order 10450*, Section 8(a)(1)], or where summary suspension is deemed "necessary in the interests of the national security," pursuant to the statutory standard reflected in the language of Section 6 of the Presidential Order.[17] Further evidence for this conclusion may be found in the United States Civil Service Commission's "*Guides for Members of Security Hearing Boards Under Executive Order 10450*," IN-203, July, 1953, which provides:

> "The Executive Order further provides that the head of each agency shall * * * —suspend; and terminate in accordance with the act of August 26, 1950, the employment of any person whose retention in employment would not, *under the*

[17] It is true that Section 3(a) of the Order requires that each new appointment be investigated in terms of the possible adverse effect on security of the appointee's holding the particular position sought, but this applies only to new appointees, as opposed to incumbents. It is also true that Section 3(b) provides for the designation of certain jobs within an agency as sensitive, but this is only for the purpose of requiring a fuller than "minimal" investigation of their occupants.

standards of Executive Order 10450, be clearly consistent with the interests of national security." Hearings, Senate Subcommittee, Committee on Government Operations, on S. J. Res. 21, March 25, 1955, pp. 764-765. [Emphasis supplied.][18]

Thus, respondents' claim that the "clearly consistent" standard of the Executive Order does not provide a more onerous standard of judgment than P. L. 733 (Res. Br. 45-48) does not square with either an analysis of the Order or with the recent historical record. *E.g., Hearings, Senate Subcommittee, Committee on Post-Office and Civil Service, pursuant to S. Res. 20,* 84th Cong., 1st Sess., June 2, 9, August 30, September 28, 1955, pp. 72-73, 79-80, 112-113, 522, 918-920; Yarmolinsky, "*Case Studies in Personnel Security,*" Bureau of National Affairs, August, 1955, pp. 14-19, 38-44, 54-59, 60-69, 70-79, 85-91, 128-132; Pet. Br. 44-47. Actually, the burden placed on the employee by the President's standard is very nearly intolerable; if called in question, few but the abnormally impeccable could safely predict that their characters and associations (past and

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[18] Respondents' further assertion (Res. Br. 43, 44-45) that Executive Order 10450 provides for dismissal only where the agency head determines that termination is "necessary or advisable in the interests of the national security" is equally spurious. The fact is that the Executive Order and all Agency Security Regulations adopted thereunder, including those of the Department of Health, Education and Welfare, explicitly provide that *no* employee will be retained in employment unless such retention "is found to be clearly consistent with the interests of the national security." *Executive Order 10450,* Sections 2 and 7; Security Regulations, *Department of Health, Education and Welfare,* Sections 2, 3(a), 5(f), Bureau of National Affairs, "*Government Security and Loyalty,*" pp. 15:561, 15:562-563, 15:565; Justice Department, *Sample Security Regulations,* Sections 2, 3(a), 5(g), *id.,* at pp. 15:101, 15:104-5; *Analysis,* Departmental Regulations, *id.,* at pp. 11:1-2, 11:34, 11:43.

present) could be shown to be "*clearly consistent*" with a concept so broad and ill-defined as the Executive Order's interpretation of "the interests of national security." On the other hand, the legislative history of P. L. 733 affirmatively indicates that Congress did not intend by the 1950 Act to exclude from Government all but the utterly pure. Its own standard was at once more flexible and realistic, for it only required discharge of an employee if, on the basis of both his job and the charges, removal was "necessary or advisable in the interests of the national security" (Pet. Br. 18-27).[19]

C. Congress Did Not Ratify Executive Order 10450 as Applied in This Case.

Respondents' argument with respect to the alleged ratification by Congress of Executive Order 10450 is misleading. At best, the evidence of ratification cited by respondents (Res. Br. 57-61) demonstrates Congressional acquiescence in the President's extension of the 1950 Act

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[19] Respondents exhibit a remarkable lack of imagination when they allege that it is "highly improbable, if not inconceivable," that a department head would determine an employee's dismissal to be "necessary or advisable in the interests of the national security," and then fail to discharge him (Res. Br. 45). While the department head could have determined, under the statute, that the dismissal of an employee holding a "sensitive" position was "necessary or advisable" in the national security interest, the department head was not required under P. L. 733 to discharge him. *The statute gave him discretion either to discharge the employee or transfer him to a "non-sensitive" position within the agency* (Pet. Br. 18-20). It is that discretion which the Executive Order destroys in all cases other than those which fall under the criteria of Section 8(a)(1).

to all government departments and agencies.[20] This does not mean that in any specific case Congress ratified the application of the statute to a concededly loyal employee employed in a non-sensitive, non-policy-making position in a non-sensitive agency, either by the agency head or by the Presidential Order. In fact, representatives of the Executive branch, testifying on the operation of the statute as extended by the Executive Order, repeatedly informed Congressional committees that neither the statute nor the Executive Order is used to discharge as a "security risk" a concededly loyal employee holding a non-sensitive, non-policy-making position in a non-sensitive agency. For example, on May 14, 1953, shortly after the issuance of Executive Order 10450, respondent Moore, a Commissioner of the United States Civil Service Commission, stated publicly that: "* * * one of the first

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[20] Senator Carlson, Chairman of the Senate Committee on Post Office and Civil Service in the 83rd Congress, made this clear when he said: "Section 3 of Public Law 733 provides that the provisions affecting the foregoing departments and agencies shall apply to such other departments and agencies of the government as the President deems necessary. *The Executive Order under consideration merely extended Public Law 733 to the rest of the Federal service.*" *Hearings, Senate Committee on Post Office and Civil Service on Employees' Security Program*, 83d Cong., 2nd Sess. March 2, 1954, Appendix "A" to *Hearings before a Senate Subcommittee of the Committee on Post Office and Civil Service, pursuant to S. Res. 20*, 84th Cong., 1st Sess., at p. 973. [Emphasis supplied.] The Congressional debates surrounding the "McCarran riders" to the Appropriation Bills for the Departments of State, Commerce and Justice (Res. Br. 58-60) are demonstrable of no more, of that. The "riders" provided for summary, unappealable dismissal of employees of these Departments "when necessary or advisable in the interests of the United States," in the discretion of the department heads concerned, but contained no provision for "hearings." Since P. L. 733 required a hearing and specifically included the Departments of State, Commerce and Justice by its terms (5 U. S. C. 22-1), and since Executive Order 10450 also contained provisions for "hearing," the McCarran riders were deemed "surplusage," and less fair to the employees of these Departments than the Executive Order. See *99 Cong. Rec. 4513*, Remarks of Congressman Murray.

acts of President Eisenhower was to make certain that our Government is free from disloyal employees and from security risks in *sensitive positions.*" *Hearings, Senate Sub-Committee, Committee on Post Office and Civil Service, pursuant to S. Res. 20,* 84th Cong., 1st Sess., May 26, 1955, at p. 13. [Emphasis supplied.] On March 8, 1955, almost two years after the issuance of Executive Order 10450, Mr Tompkins, Assistant Attorney General, testified as follows:

> "Mr. Tompkins: * * * At the request of the Department of Defense, Congress, in 1950, passed Public Law 733—act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22-1, *et seq.*). It was pointed out both by congressional committees and those who testified at the hearings on the bill that alcoholics, people with unsatisfactory associations, people subject to blackmail, people who talked too much, could constitute a serious danger to the security of the United States even though not necessarily proved disloyal.
>
> "There is and was no doubt, of course, that those who are disloyal should not be working for the Government.
>
> "Senator Humphrey: Just as a point of information. Are there not procedures under civil service for the removal of persons the likes of which you have just described? I mean people who are not necessarily disloyal, whose patriotism to the Nation or their loyalty to the Nation is unquestioned, but whose work habits or social habits or living habits are highly undesirable? Can such persons be removed from Government employment without the security regulations?
>
> "Mr. Tompkins: You are quite correct, that they could be removed, but they could be removed only after a statement and charges and an opportunity to answer those statements or charges is given the individual.
>
> "Under the security program, *if in a sensitive position,* they may be gotten out immediately. They may be suspended. I think that is the only difference." *Hearings, Senate, Subcommittee, Com-*

mittee on Government Operations on S. J. Res. 21, March 8, 1955, pp. 91-92. [Emphasis supplied.] [21]

Mr. Tompkins also testified that the President had no authority to divest the agency head of his statutory discretion under P. L. 733. *Hearings, id.*, at pp. 59-60. While respondents alleged that Mr. Tompkins "meant" only that the President had no power to change the procedural steps leading to dismissal which P. L. 733 prescribes (Res. Br. 52, ftn. 32), Mr. Tompkins nevertheless assured Senator Cotton that the Senator was correct when he asked:

> "Am I correct in my understanding that the Congress in its infinite wisdom has written into the law that each department head has complete authority in determining procedures in his department in connection with security?" (*Ibid.*)

So, whatever Mr. Tompkins "meant" to say, Congress was informed that the department head had "complete authority" in determining procedures in his department in connection with security (*Ibid.*). In addition it was well known that Mr. Kimball, Undersecretary of the Navy, had informed the Legislative branch that the decision to apply or not to apply the statute would have to rest in the discretion of the several department heads, varying from agency to agency and from position to position, depending upon the relative degree of sensitivity of the various agencies and various positions within those agencies. *Hearings, House Committee on Post Office and Civil Service on H. R. 7439*, 81st Cong., 2nd Sess., March 30, 1950, at pp. 69-73. Thus, Congress never understood,

[21] See also: *Hearings, id.* at pp. 96, 99-100, 125-126. While respondents attempt to destroy the force of this testimony (Res. Br. 61-62, ftn. 22), the fact that Mr. Tompkins was contradicted on March 9, 1955, by Governor Brucker caused the Acting Counsel of the Subcommittee to remark, with respect to alcoholics:

> "Mr. Greene: Governor Brucker, I am somewhat confused by this because yesterday when Mr. Tompkins appeared before the Committee he stated, I think on three separate occasions, that an individual who is a drunk and occupies a nonsensitive position would not be subject to Executive Order 10450." *Hearings, id.*, at p. 161.

at any time, that P. L. 733 was required by the Presidential Order to be applied by the agency head to each and every employee, loyal and disloyal alike, in each and every agency of the Government, irrespective of the degree of sensitivity of the employee's position.

The doctrine of Congressional ratification presupposes knowledge on the part of Congress as to the Executive acts ratified. Cf. *Interstate Commerce Commission* v. *Railway Labor Executives Association*, 315 U. S. 373, 378-379; *C.I.R.* v. *Glenshaw Glass Co.*, 348 U. S. 426, 431. In the case at bar, not only is it clear that Congress was never made aware that P. L. 733 and Executive Order 10450 were applicable to a concededly loyal employee holding a non-sensitive position in a non-sensitive agency, but responsible officials of the Executive branch assured Congressional committees that such was not the case. If, as respondents observe (Res. Br. 61-62, ftn. 22), there was "*[a]ny misunderstanding*" created by the testimony of Assistant Attorney General Tompkins, the fact that it may have been subsequently dissipated is nevertheless destructive of respondents' assertion.[22] Misunderstanding is not knowl-

[22] Whether or not this "misunderstanding" has been resolved in the Executive branch is open to serious question. See *Hearings, Senate Subcommittee, Committee on Post Office and Civil Service, pursuant to S. Res. 20*, 84th Cong., 1st Sess., September 28, 1955 at p. 947. The difficulty with respondents' position is that Congress was never aware, nor did the Executive branch ever attempt to make it aware, that a concededly loyal employee holding a non-sensitive position was to be considered, if he associated with Communists, anything different from "unsuitable," *e.g.*, an "alcoholic" or an "adulterer." Cf., testimony of Edward R. Dixon, *Hearings, id.*, at pp. 564-576. When respondent Young was asked about this particular problem, as it related to the Veterans Administration, he replied: "Are you suggesting, Senator, that a Communist in a non-sensitive job is not a security risk?" *Hearings, Senate Committee on Post Office and Civil Service on Employees' Security Program*, 83rd Cong., 2nd Sess., March 10, 1954, Appendix "A," *id.* at pp. 1040-1041. It is just this kind of failure to define clearly the concept of "security risk" that has caused repeated Congressional "misunderstanding" as to the operation and effect of Executive Order 10450.

edge, and without knowledge Congress could not have ratified the invalid and *ultra vires* action complained of in the instant case.

D. The President Could Not Validly Divest the Agency Head of Her Statutory Discretion.

The total effect of these features of the Executive Order was to deprive the department and agency heads who were charged with administering the statute of any real discretion in "security" cases, particularly where, as here, security was nowhere involved. However, it was precisely because these officers were best able to judge the highly variable sensitivity of the work which they supervised that Congress had given them "absolute discretion" in the matter (Pet. Br. 19, 35-37). The President was empowered to extend the provisions of the Act to new departments and agencies, no more. We do not suggest that he could not issue advisory instructions to guide agency heads; but he could not issue binding orders, restricting or altering their discretion and changing the statutory standards. If authority for this proposition were needed, *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524, and *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, provide it. Even in the area of military justice, it has been held that the Convening Authority cannot properly exercise his discretion to remit or suspend court-martial sentences under Articles 64 and 71 of the Uniform Code of Military Justice (64 Stat. 128, 50 U. S. C. 651, and 64 Stat. 131, 50 U. S. C. 658, respectively), where he announces that he will not consider the retention of any military personnel sentenced to punitive discharge. *United States* v. *Wise* (U. S. Ct. Mil. App. No. 6937, November 4, 1955), 6 USCMA ——, 20 CMR ——, 24 Law Week 2209. In the *Wise* case, the Court of Military Appeals held that although the Convening Authority had absolute discretion to approve the sentence, he was required first to consider the record with an open mind before rendering his decision.

We have shown in detail how the Executive Order conflicts with the statute generally, and specifically in petitioner's case. That order was far more than an implementation of the Act, a mere laying down of lines. Respondents imply, however (Res. Br. 49-56), that if there is such a conflict, the statute must yield; they evidently ignore the contrary decisions of this Court on that question. In *United States* v. *Perkins*, 116 U. S. 483, it was held that where Congress vests the appointment of inferior officials in the heads of departments, pursuant to the second clause of Article II, Section 2, of the Constitution, it can also restrict and regulate their removal by the same department heads.[23] In *Eberlein* v. *United States*, 257 U. S. 82, the Court carried this reasoning to its logical conclusion, holding that where Congress has in fact vested the appointment and removal of inferior officials in a department head, the President can not interfere with the latter's authority. Although the *Eberlein* case involved the President's attempt to reinstate a customs official whom the Secretary of the Treasury had removed, its reasoning is no less valid here.

III

The Secretary failed to give petitioner "a written statement" of her "decision" to dismiss him in accordance with P. L. 733.

The Secretary's notice of her decision to terminate petitioner's employment failed to state the reasons for that decision. In answer to petitioner's contention that this too invalidated his discharge, respondents make the obvious point that P. L. 733 does not *in haec verba* require such

[23] The *Perkins case* left open the question of Congress' right to restrict removals of officials whose appointment it had vested directly in the President. Cf. *Myers* v. *United States*, 272 U. S. 52. But that issue is not presented on the facts of this case, either.

reasons. However, the question really is what Congress intended by the statutory language, "a written statement of the decision of the agency head." We think it meant to require a statement of reasons rather than a bare pronouncement of the result. Cf. *Gonzales* v. *United States*, 348 U. S. 407.

The history of the statute shows that Congress placed particular reliance on the safeguard requiring agency heads to review and independently decide each case under the Act where dismissal was recommended. "It is the intention that the head of a department can delegate his authority to suspend an employee but he cannot delegate his power to terminate the services of an employee who has been suspended under this legislation." *S. Rep. No. 2158*, 81st Cong., 2nd Sess., p. 3 (1950); Pet. Br. 49. Yet the safeguard is meaningless unless the record clearly shows the department head's reasons for exercising his authority. The reasoning of the court below in *Mulligan* v. *Andrews* (C. A. D. C.), 211 F. 2d 28, is not restricted to the specific statute in that case; it has independent validity:

> "The purpose of requiring this content for the 'reason' for removal is not to provide a record to facilitate judicial review of such 'reasons' on their merits since review is narrowly limited in the absence of express statutory provision therefor. On the contrary, it is required as a procedural safeguard against just the sort of errors which, if committed at the administrative level, are beyond the reach of our review." *Id.*, 211 F. 2d, at p. 31.

The point is illustrated by respondents' second contention in this regard, *viz.*, that the Secretary's letter of termination, referring to the statement of charges and petitioner's refusal to explain those charges, was a sufficient statement of reasons in any event. Of course, petitioner's refusal to answer the charges was not a ground for dis-

missal under the statute;[24] the Secretary had authority to dismiss him only for actual reasons of national security. She could not take a default judgment by reason of such refusal, for the Act imposed upon her the ineluctable duty to make an independent review and decision before firing petitioner.

Similarly, the fact that the charges had nothing added or subtracted since their issuance is no answer, for the Secretary was required to review the charges, including the facts supporting them, before reaching her decision. Although petitioner had the right to answer or explain those charges and to request a hearing, despite his failure to do so the Secretary had the duty to consider which, if any, of the charges was proven to her satisfaction and further which, if any, of the proven charges warranted termination.[25] Her compliance with the statute in this respect could only be shown if she set forth the basis of her final decision. It is this which the statute requires in the form of a "written statement" of her decision.

The court below and respondents reason too narrowly when they say that a "decision" is only the result, whereas an "opinion" states the reasons. Moreover, they misapply judicial terminology to the administrative world. In the latter field, the word "opinion" is a rarity and, as we pointed out in our prior brief, an administrative "decision" commonly includes a statement of the reasons as well as

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[24] Nor is it listed among the factors to be considered under Executive Order 10450. See Section 8(a) of that Order.

[25] Presumably, under respondents' reasoning, even where statutes explicitly require a statement of reasons, the charges themselves would always suffice if in the opinion of the agency head they were neither explained nor vitiated prior to the final decision. Yet courts require that the actual reasons for that decision also be stated. See, *e.g.*, *Mulligan* v. *Andrews* (C. A. D. C.), 211 F. 2d 28. For the same reason, Secretary Hobby's reference to "all the documents in your case" (R. 21) was patently inadequate.

the result. Congress is as aware of that usage as this Court (See *Pet. Br.* 50). Therefore, it seems plain that in requiring the Secretary to give a "written statement" of her decision to discharge petitioner under the statute, Congress required that she set forth the grounds for that decision. If she purported to do so in her letter of January 15, 1954 (R. 21), it is clear enough that the "reason" mentioned there, petitioner's failure to explain the charges against him, would not support dismissal under P. L. 733. However, we think it more true to say she gave no reasons,[26] and therefore failed to comply with the Act. On this ground also, petitioner's discharge was invalid.

[26] The reference to "all the documents" was not adequate. *Op. cit.*, *Supra*, ftn. 25.

CONCLUSION

For the reasons set forth herein, the judgment of the court below must be reversed.

Respectfully submitted,

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